# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

## No. 136.

MARIA DE LAS NIEVES CABRERA AND MAGDALENA DE LA CRUZ, APPELLANTS,

*vs.*

THE AMERICAN COLONIAL BANK, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

## BRIEF FOR APPELLANTS.

### STATEMENT OF CASE.

This suit was brought by the American Colonial Bank, a corporation organized under the laws of the State of West Virginia and having a place of business in the city of San Juan, Porto Rico, against Maria de las Nieves Cabrera y Pruna, Magdalena de la Cruz Cabrera y Pruna, and the Banco Territorial y Agricola, a corporation organized under the laws of the Kingdom of Spain and having a place of business in the city of San Juan, Porto Rico, which last-named defendant subsequently disclaimed any interest in the controversy and against whom no further proceedings were had or conducted (R., 29).

Previous to the year 1900 José Maria Suarez carried on a mercantile business in San Juan, Porto Rico. Shortly before that date he died, and two of his brothers, to wit: Ramon Suarez and Manuel Suarez—together with the widow of the said José Maria Suarez, appellant Maria de las Nieves Cabrera y Pruna, continued the business under a reorganization made in the early part of 1900 under the name and style of Successores de J. M. Suarez y Compañia, the same being a limited partnership or society known to the Spanish law as "Sociedad en Comandita," provided for in section 145-150 of the Spanish Code of Commerce (R., 29).

In this limited partnership appellant Maria de las Nieves Cabrera was a limited partner to the extent of eight thousand dollars ($8,000), *Provincial* currency, fully paid, because her husband had originally bought the store with her private funds and her said husband, or the said business, owed her at his death this sum of money, and she took an interest to that extent in the reorganized limited company with her said brothers-in-law, but she took no part in the management thereof (R., 30).

It may be stated, in this connection, that about the year 1900 the Spanish provincial currency in Porto Rico was redeemed at the ratio of sixty cents on the dollar.

The said limited partnership, being in need of money, borrowed from the complainant bank on the 21st day of February, 1900, the sum of *8,000 pesos*, provincial currency, equivalent to $4,800, United States currency, at the legal rate of exchange, and gave its promissory note to the bank therefor, payable in six months, at nine per cent. interest. This note appears on its face to be a joint note signed by the said limited partnership, Successores de J. M. Suarez y Compañia and appellant Maria de las Nieves de Suarez. It will be borne in mind that as said appellant was the widow of one Suarez she signed in the manner last-above indicated, implying thereby that she was the wife or widow of Suarez. A literal copy of this note appears on page 30 of the Transcript of

Record. Although apparently a joint-note, it does not contain the usual qualifying phrase found in similar obligations in civil law countries to the effect that the liability of the obligors shall be joint (*solidaria*) as distinguished from a several obligation (*mancomunada*). The note describes certain "collateral security for payment of this or any other liability or liabilities of ours to said company (bank) now existing or which hereafter may be contracted" which had been deposited with said bank (R., 30).

The "collateral security" consisted of a mortgage upon a house of appellant Maria de las Nieves Cabrera situated on Sol Street, in the city of San Juan, and also an attempted transfer by her to said bank of such interest which she might have as heir in the estate of her deceased mother, which at the time had not been partitioned or set apart, for which reason no definite description was, or could be, given of the particular property to which such transfer should apply.

In order to obtain this money the brothers-in-law of appellant Maria de las Nieves Cabrera, who were the active partners in the said limited partnership of Successores de J. M. Suarez y Compañia, induced her to execute to appellee the mortgage hereinafter described. This mortgage was executed on the 21st day of February, 1900, and contained the following stipulations, among others (pages 31-35, Transcript of Record):

> "*First.* That on this date the mercantile firm of "this city, Successores de J. M. Suarez y Compañia "(special partnership) as direct debtors, and the party "of the first part as surety for the debtors and prin- "cipal guarantor of the debtors, have executed and "signed to the order of the party of the second part, "a promissory note for 8,000 pesos, provincial "money, with interest at the rate of nine percentum "per year, payable in advance, for the term of six "months, and for value received.
>
> "*Second.* That the surety of the said obligation "has offered to the creditor, namely, the bank, and

" the latter has accepted, to execute in its favor a first " mortgage on a piece of property of her own and to " transfer to it certain inherited rights which she " possesses, both to respond for the payment of the " principal of the said obligation, of its interests, ex- " penses, costs, and damages which may accrue to " the creditor in case of the judicial claim in the form " and under the conditions which the appearing par- " ties are about to specify in the following clauses " R., 31):

" *Mortgages.*

" *First.* Mrs. Maria de las Nieves Cabrera y Pruna, " in order to guarantee the payment of 8,000 pesos, " current provincial money, principal amount of the " promissory note referred to in clause No. one of " this deed, of its interests in advance at nine per- " centum per year, and in case of judicial claim the " expenses, costs, and damages accrued to the creditor " up to the sum of 1,000 pesos, provincial money, " which she fixes for that purpose, she specially mort- " gages in favor of the American Colonial Bank of " Porto Rico the urban property, or 1-story house, " brick built, with flat roof, located on No. 75 Sol " street, third municipal district of this city, bounded, " etc.

(Here follows description of this house.)

" *Appraisement.*

" *Second.* In case of judicial claim and in accord- " ance with Article 127 of the Mortgage Law, the ap- " pearing parties hereby appraise the property in the " value of 9,000 pesos, provincial money, and hereby " renounce to any new appraisement.

" *Cession.*

" *Third.* The party of the first part, Mrs. Maria de " las Nieves Cabrera y Pruna, states that she is one " of the heirs of her legitimate mother, Mrs. Nieves " Pruna y Vanrosi, as per clause 9 of the will which

" she executed in this city on the 24th of February,
" 1898, before the notary, Mauricio Guerra Mon-
" dragon y Mejias, as well as legatee of the third part
" of free disposition, and with the right of being bet-
" tered in the other third part of the properties of
" the testatrix, both together with her sisters, Mrs.
" Josefa, Mrs. Magdalena, and Mrs. Ana Cabrera y
" Pruna, as per clause 5 of the will above referred to.

" And Mrs. Maria de las Nieves Cabrera y Pruna
" grants: that all and every, real and personal, rights
" which may belong to her as heir, as legatee, and as
" favored or bettered heir in the estate and properties
" of her deceased mother, Mrs. Nieves Pruna y Van-
" rosi, she cedes, renounces, and transfers without
" reservation in favor of the American Colonial Bank
" of Porto Rico, placing same in her place, person,
" action, and rights, with ample powers, in order that
" without the concurrence of said party of the first
" part it may intervene and attend to all of the acts
" of the will and testament of the mentioned Mrs.
" Nieves Pruna y Vanrosi: as to the appointment of
" appraisers, as to the liquidation, partition, and ad-
" judication of the inherited property, doing all the
" acts and taking all the steps required, or that the
" bank may deem convenient; executing and signing
" the public and private documents necessary for the
" completion of the testamentary proceedings, the
" bank taking possession for itself of the property
" which may be adjudicated to the ceding party.
" The object of the present transfer or cession is that
" if Mrs. Maria de las Nieves Cabrera y Pruna should
" fail to pay the 8,000 pesos, provincial money, or
" interests of the promissory note, of which she is
" surety, because of its maturity, it should not have
" been paid by Successores de J. M. Suarez y Com-
" pañia, the American Colonial Bank then, without
" prejudice to the foreclosure of the mortgage which
" she has executed in its favor, may collect from the
" value of the rights and properties corresponding to
" the ceding party according to the will of Mrs.
" Nieves Pruna y Vanrosi, the principal, interests,
" expenses, costs, and damages which may have been
" adjudicated to her in full, or from the part assessed

"to her in payment thereof, if the proceeds of the "sale of the property mortgaged should not be sufficient to cover the principal, interests, and other "expenses; and the American Colonial Bank may, at "its pleasure, if the ceded rights should be sufficient "to cover the total amount of its credit, it can pay "itself with them, and if not, foreclose the mortgage, "without waiving such personal action as it may "be entitled to take against the debtors and the "surety of the said promissory note; but if the said "note be paid at maturity, then the American Colonial Bank in return shall cede back to Mrs. Maria "de las Nieves Cabrera y Pruna the same rights "herein ceded" (R., 32, 33).

When this document was presented to the registrar of property the following notation was made thereon by him:

"The aforesaid document has been recorded as to "the mortgage within at folio 202 of volume 17 of "the city, property 130, duplicate, 11th inscription, "and the inscription as to the cession also mentioned "therein is denied, as no description is given of the "property, rights and action ceded, and therefore it "cannot be ascertained whether they are recorded in "favor of the party making the cession; and this defect, being such that it cannot be amended, the provisional inscription cannot be allowed.

"San Juan, Porto Rico, March 15, 1900.

"(Sgd.) The Registrar: José Benedicto."

(R., 34.)

Subsequent to the execution and registration of the foregoing mortgage upon the property on Sol Street, the testamentary proceedings relating to the estate of the deceased mother of appellants were terminated and the determination was made of the interest of the appellant Maria de las Nieves Cabrera y Pruna therein, whereupon such interest was assigned to her by a division made as the result of the separation and distribution to her of an undivided interest in four other properties in the city of San Juan, which are set forth in paragraph 6th of the statement of facts (R., 35).

On the 12th day of March, 1901, appellant Maria de las Nieves Cabrera y Pruna transferred by deed all of the above participations or hereditary interests to her sister, appellant Magdalena de la Cruz Cabrera y Pruna (R., 35).

On the 13th day of March, 1901, there was executed by and between the said limited partnership, Successores de J. M. Suarez y Compañia, without the intervention of appellant Maria de las Nieves Cabrera y Pruna, upon the one part, and the American Colonial Bank, appellee, upon the other, before the notary public Santiago R. Palmer, in the city of San Juan, a document, the effect of which is the principal issue and controversy in this case. This document contains the following stipulations among others:

"No. 149, in the city of San Juan, on March 31, "1901. Before me, Santiago R. Palmer, notary of "the college of Porto Rico and resident of this city "with abode on the first floor of the house marked "with No. 231 Fortaleza, corner of Cruz, appear as "party of the first part the Mercantile Society, Lim- "ited, doing business under the firm name and style "of 'Successores de J. M. Suarez y Compañia,' or the "establishment 'Bazar Europa,' No. 38 on Fortaleza "street, of this city, represented by its managers and "active partners Don Manuel and Ramon Suarez y "Cordero, of lawful age, bachelors, merchants, and "residents of this city, as it appears from the deed "under which the said society was formed under "date of February 6, 1900, executed before the "notary Mauricio Guerra Mondragon y Mejias, re- "corded on page 138 of volume 16th, relative to "partnerships, page 878, registration first.

"And as party of the second part Edwin L. Arnold, "of lawful age, married, cashier of the American Co- "lonial Bank of Porto Rico and resident of this city.

"Having to my judgment the legal capacity neces- "sary, without any limitation whatsoever, to execute "this deed of sale of dry goods,—and state:

"(1) The society Successores de J. M. Suarez y Com- "pañia now is debtor to the American Colonial Bank "of Porto Rico in the sum of $4,800.00, due on the

"21st of August, last, according to the promissory "note which they executed, and not being able to de- "liver the amount thereof have offered to make pay- "ment thereof in mercantile stocks according to the "detailed inventory which they exhibit, subscribed by "the society, and which they take with them, bear- "ing my signature and seal, and to which the credi- "tor bank has manifested its conformity.

"(2) That carrying into effect the sale of the "stocks set forth in the inventory exhibited, Messrs. "Suarez y Cordero, in the representation by which "they act, transfer all of the said effects set forth in "the said inventory to the creditor bank for the sum "of $4,800.00, leaving the same in the possession of "the bank in payment of said amount of the prom- "issory note above mentioned.

"(3) Mr. Edwin L. Arnold accepts this deed; re- "ceives the inventory above mentioned, and, in con- "sequence thereof, says that he leaves in the said "establishment of the seller, the Bazar Europa, all "of the stock and goods which such persons have "sold to him in payment for the $4,800.00 which "they owe to the American Colonial bank, in order "that for the account and commission of the latter "they proceed to realize from the said goods, prices "not to be less than those fixed in the inventory, "and they are obliged to present to the bank weekly "account of sales they may make, together with the "value in cash thereof, until the complete realization "of the same takes place" (R., 36).

The stock of goods transferred by the foregoing document to appellee was permitted by it to remain in the possession of Successores de J. M. Suarez y Compañia, who disposed of a portion of the same; and the latter concern having instituted bankruptcy proceedings voluntarily in December, 1901, in the District Court of the United States for Porto Rico, what was left of such stock was included in the schedules of bankruptcy as a part of the assets of the said limited partnership. Appellee, for some reason, filed no claim in the bankruptcy proceedings and received no part

of the assets collected by the trustee in bankruptcy and distributed among the general creditors of the said limited copartnership (R., 38).

December 17, 1901, appellee herein filed its bill of complaint, according to the forms and pleadings in equity, in the District Court of the United States for Porto Rico, against the appellants herein for the purpose of recovering from appellee Maria de las Nieves Cabrera y Pruna the amount of the note signed by her as guarantor for Successores de J. M. Suarez y Compañia, together with interest thereon, counsel fees, and costs (R., 1).

Said bill prayed that in default of the payment of said amount:

> "The usual decree may be made for the sale of the "mortgaged premises aforesaid to satisfy the amount "so found to be due, together with your orator's "attorney's fees, expenses and costs of this suit, and "that the said defendants and all persons claiming "by, through or under them subsequent to the be-"ginning of this suit, and all other persons having "any liens upon said mortgaged premises subsequent "to the mortgage of your orator, either as purchaser, "encumbrance or otherwise, may be barred and fore-"closed of all equity of redemption in or to the said "premises, or any part thereof, and that your orator "may have such other and further relief as the cir-"cumstances of the case may require and as the court "may deem proper and agreeable to equity" (R., 4).

The bill of complaint charged that appellant Maria de las Nieves Cabrera by the transfer made by her on the 12th of March, 1901, hereinbefore referred to, to her sister, appellant Magdalena, sought to deprive the appellee bank "of the benefit of its security in the property so obtained by her as above set forth from her said mother," and that "said pretended conveyance and transfer was made entirely without consideration, and was accepted by said defendant Magdalena de la Cruz Cabrera y Pruna, with full knowledge of the

rights and claims of your orator against the said property attempted to be conveyed by her."

An issue was duly made by the filing of separate answers by appellants. Appellant Maria de las Nieves Cabrera y Pruna set up the deed of sale of March 13, 1901, as a payment and discharge of the indebtedness; she alleged that her signature to the mortgage described in the bill of complaint was obtained by the false and fraudulent representations of her brothers-in-law, Manuel and Ramon Suarez, aided by an agent of the appellee bank, one Eduardo Costa y Gomez; that after the execution of the said note, and without her consent, appellee bank extended the time of payment thereof, and that it has also received from time to time various sums of money from the principal debtor on account of said indebtedness.

She averred that the transfer of her participation in her mother's estate to her sister, Magdalena, was made in good faith and for a full and valuable consideration.

Appellant Magdalena averred her good faith in the purchase of the said participations from her sister, Maria de las Nieves Cabrera y Pruna, based upon money considerations, and she denies that she had knowledge of any rights or claims in and to said participations upon the part of appellee.

Appellee proceeded throughout the cause below on the theory that the document executed February 21, 1900, was a mortgage not alone on the house on Sol street, which was then the actual property of appellant Maria de las Nieves Cabrera y Pruna, but also upon the interest or participation which she might have at the date of such instrument in the estate of her deceased mother.

Upon the trial of this cause below the principal contention of appellants was that the transfer of the stock of goods above referred to, in the manner and form in which it was made by the principal debtor, Successores de J. M. Suarez y Com-

pañia, and received by the creditor, appellee, the debt represented by the note and mortgage hereinabove set out was paid and discharged; and also that under all circumstances appellant Maria de las Nieves Cabrera y Pruna, being but a guarantor, was released from liability by reason thereof.

Appellee sought to avoid the force and effect of the said document and of the defense of appellants by the testimony of its cashier, Mr. Edwin L. Arnold, who represented it in the execution of such document, to the effect that it was not his purpose or intention to discharge the debt; that he did not know the contents of the document when he signed it.

The finding of fact (No. 9) made by the court below (page 37, Transcript of Record) contains a recital of the testimony, in substance, of cashier Arnold, upon which the court below undoubtedly based its finding and decree for appellee.

No charge is made by the appellee that either of the appellants took any part in the execution of said document of March 13, 1901, nor was any testimony offered charging, or attempting to charge, them or the partners of Successores de J. M. Suarez y Compañia with any fraudulent conduct in the execution of the said document.

A decree was rendered by the court below granting appellee all the relief it prayed for in and by its bill of complaint, and in that connection also decreed the transfer from appellant Maria to her sister, appellant Magdalena, to be without force or effect as against the prior *lien* of appellee.

Appellants respectfully insist that in the absence of any claim or charge of fraud in connection with the execution of the said document the court below should have given effect to its very plain and obvious language and should have held it to be a complete discharge and payment of the debt; and that the court below improperly admitted and considered the evidence of the cashier Arnold to destroy the force and effect of such document.

From the decree rendered by the court, as aforesaid, appellants duly prosecuted their appeal.

*Appellants reply upon the following points:*

(1) The deed of sale of March 13, 1901, was a complete payment and discharge of the debt for which appellant Maria de las Nieves Cabrera y Pruna became guarantor or surety.

(2) If the court should hold that by such document the debt was not paid or discharged, then we claim:

(*a*) Appellant Maria de las Nieves Cabrera y Pruna was but a guarantor and her liability must be determined as such.

(*b*) The deed of sale of March 13, 1901, was a novation.

(*c*) It constituted under all circumstances a modification of the security and released appellant Maria de las Nieves Cabrera, the guarantor.

(3) Appellee should be estopped from the relief it prays for as against appellants, for the reason that by its own negligence and misconduct it has failed to realize its debt from the stock of goods transferred to it.

(4) Appellee acquired no specific right or interest in the inheritance or participations of appellant Maria de las Nieves Cabrera y Pruna in the estate of her deceased mother for the reasons:

(*a*) Such participations were at the time of the execution of the document of February 21, 1900, unassigned.

(*b*) The said document did not, and could not, contain any specific description of the properties, and therefore by the laws of Porto Rico at the time, and by the failure of the registrar to make any inscription, no such right or lien was created, and appellant Magdalena acquired a valid title to the specific participations subsequently acquired by and set apart to appellant Maria de las Nieves Cabrera y Pruna.

(5) If the court should hold that the deed of sale of March 13, 1901, was not a payment or discharge, and that appellant Maria de las Nieves Cabrera y Pruna was not a guarantor, but was a principal debtor, jointly liable with Successores de J. M. Suarez y Compañia, then by the note and notarial document executed February 21, 1900, her liability is only several (mancomunada) and not joint (solidaria), and therefore she is not responsible for all of the debt.

## ASSIGNMENT OF ERRORS.

In the court below appellants filed the following assignment of errors, which, in accordance with the rules of this court, they repeat here, and they rely upon the same for a reversal of this cause, viz:

(1) The action of the court in entering the decree herein, notwithstanding the release or receipt executed by complainant in favor of Successores de J. M. Suarez y Compañia on the 13th day of March, 1901, the said Successores de J. M. Suarez being the principal debtor for whom Defendant Maria de las Nieves Cabrera y Pruna was a surety.

(2) The action of the court in admitting parol testimony of the witness Edwin L. Arnold, cashier of the American Colonial bank, to nullify and make ineffective the said release and receipt.

(3) The decree of the court rendered herein is contrary to the evidence and to the equities of the case.

(4) The action of the court in entering a decree in favor of complainant, subjecting to the mortgage of February 21, 1900, the properties which were subsequently awarded to appellant Maria de las Nieves Cabrera y Pruna out of and from the inheritance in the estate of her deceased mother, which participation and assignment did not take place until after the said mortgage.

## ARGUMENT.

### Point No. 1.

THE DEED OF SALE OF MARCH 13, 1901, WAS A COMPLETE PAYMENT AND DISCHARGE OF THE DEBT FOR WHICH APPELLANT MARIA DE LAS NIEVES CABRERA Y PRUNA BECAME GUARANTOR.

Preliminary to the discussion of the points hereinbefore indicated, it is necessary to understand the position of appellant Maria de las Nieves Cabrera y Pruna with respect to the limited copartnership of Successores de J. M. Suarez y Compañia.

As appears in the findings of fact of the court below, she was a limited or silent partner to the extent of 8,000 pesos, provincial currency, or $4,800 gold, which amount she had contributed to the society before the transactions involved in this suit.

The firm or society of Successores de J. M. Suarez y Compañia was of the class known to Spanish law as "Sociedades en Comandita" or limited copartnerships.

The term "limited" or "silent" partner in Spanish is "Comanditario." This term has been translated in the War Department edition of the Spanish Code of Commerce of 1886, in force in Porto Rico, as "Special Partner."

Article 148 of this Code provides:

> "The liability of special partners ("Comandatarios," or limited partners) for the obligations and losses of the copartnership shall be limited to the funds which they contributed, or bound themselves to contribute, to the limited copartnership, with the exception of the cases mentioned in article 147. Special partners cannot take any part whatever in the management of the interests of the copartnership, not even in the capacity of special agents of the managing partners."

The Supreme Court of Spain, in construing this article, in its decision of December, 1861, held that special partners discharged their duty in contributing to the copartnership the amount agreed upon.

As from the findings of the court below it appears that appellant Maria de las Nieves Cabrera y Pruna had fully contributed the sum of $4,800.00 gold to the copartnership, she could not, under the law of Porto Rico, be responsible for its debts to any additional or greater amount.

So far as appellee is concerned with respect to the note and mortgage executed by her, she cannot be considered in the light of a general partner. The court below established a false premise in its decree by erroneously holding her to be liable as a general partner. So far as concerns appellee, therefore, and with respect to the note and mortgage executed by her, she must be considered as any other third person incurring liability only as a guarantor. We shall subsequently discuss this liability under another heading.

THE DEED OF SALE OF MARCH 13, 1901, WAS AN ABSOLUTE PAYMENT AND DISCHARGE OF THE DEBT.

The language of this document is too clear and plain to admit of discussion as to its meaning or justify the introduction of parol testimony. It is a transfer of a stock of goods by the debtor to appellee "in payment of the debt." The appellee accepted the same "for the sum of $4,800.00," as appears in the second paragraph of the document.

This stock was left by appellee in the possession of the debtor to be realized upon for the benefit of the former. It was only natural that such stock could be sold to better advantage by the debtors in their place of business than by the bank.

The only defense made by appellee to avoid the plain and positive meaning and effect of this document was that the bank's cashier, Mr. Arnold, did not understand the nature

and effect of the document when he signed it. In paragraph 9 of the findings of fact, made by the court below, the court recites the testimony of Mr. Arnold upon t' subject. This paragraph does not constitute a finding of imate facts by the court, and we believe is insufficient for the purpose.

But if we consider it for all that it may be worth, it falls far short of a legal reason for avoiding the document in question. No charge of fraud is made against either the principal debtor or the guarantor, the appellant Maria de las Nieves Cabrera y Pruna.

Mr. Arnold admitted that the document was read to him, but it appears that he was under the idea that his bank was taking the stock only "as additional security for the purpose of protecting them against the action of the other creditors, which would close up the business and prevent the bank from collecting its claim against them * * * that he took little or no interest in it."

We submit that the explanation of Mr. Arnold did not justify the court below in disregarding the plain meaning and effect of the document. This testimony was by appellants objected to, and, upon their objection being overruled, due exception was taken. The rulings of the court on the admission of this evidence have been brought up in proper manner by the appellants. (See pages 38-41, inclusive, Transcript of Record.)

The rights and liabilities of the parties herein so far as the law is concerned must be determined by the Spanish Civil Code of 1889, in force in Porto Rico until its revision in 1902. Our references to the Civil Code, therefore, are to the former code.

> "Obligations arising from contracts have legal force
> " between the contracting parties and must be ful-
> " filled in accordance with their stipulations.
> Article 1091.
>
> " Contracts shall be binding whatever may be the
> " form in which they may have been executed, pro-

"vided the essential conditions required for their "validity exist.

Article 1278.

"If the terms of a contract are clear and leave no "doubt as to the intentions of the contracting parties "the literal sense of its stipulations shall be observed.

Article 1281.

"Commercial contracts shall be executed and com- "plied with in good faith according to the terms in "which they were made and drafted without evading "the honest, proper and usual significance of the "written or spoken words with arbitrary interpreta- "tions, nor limiting the effects which are naturally "derived from the manner in which the contractors "may have explained their wishes and contracted "their obligations.

Article 57, Code of Commerce.

"When the clauses of a contract are clear and ex- "plicit there is no necessity to have recourse to the "rules for interpretation."

Decisions of the Supreme Court of Madrid, April 11 and June 19, 1865, also March 1, 1862; see also Decisions of March 21, 1900, October 12, 1900, January 10, 1901, April 24, 1901, July 6, 1901.

The action of the court below in admitting parol testimony of the witness Arnold to explain the document in question was error.

By the Law of Evidence of Porto Rico, in force at the time of the trial below, this evidence was clearly incompetent:

"When the terms of an agreement have been re- "duced to writing by the parties it is to be con- "sidered as containing all those terms, and there- "fore there can be between the parties and their rep- "resentatives or successors in interest no evidence of "the terms of the agreement other than the contents "of the writing, except in the following cases:

"(1) Where a mistake or imperfection of the writ-
" ing is put in issue by the pleadings.
"(2) Where the validity of the agreement is the
" fact in dispute."

Section 25, Law of Evidence, enacted by the Legislative Assembly of Porto Rico, and approved by the governor March 9, 1905.
(See acts and resolutions of Porto Rico, 1905, page 73.)

But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 28, or to explain intrinsic ambiguities, or to establish the illegality or fraud. The term "agreement" includes deeds and wills as well as contracts between the parties.

"For the proper construction of an instrument,
" the circumstances under which it was made, includ-
" ing the situation of the subject of the instrument
" and of the parties to it may also be shown, so that
" the judge be placed in the position of those whose
" language he is to interpret."
Section 28, same law.

The foregoing sections of the Law of Evidence of Porto Rico do not justify parol evidence to interpret a document which is clear and positive in its meaning and concerning which there can be no doubt. There is no ambiguity in the document in question; no mistake or imperfection of the writing was put in issue by the pleadings, nor was the validity of the agreement in dispute.

We refrain from citing American authorities upon such an elementary rule.

POINT No. 2.

IF THE COURT SHOULD HOLD THAT BY SUCH DOCUMENT THE DEBT WAS NOT PAID OR DISCHARGED, THEN WE CLAIM:

(*a*) Appellant Maria de las Nieves Cabrera y Pruna was but a guarantor, and her liability must be determined as such.

(*b*) The deed of sale of March 13, 1901, was a novation.

(*c*) It constituted under all circumstances a modification of the security and released appellant Maria de las Nieves Cabrera y Pruna, the guarantor.

The obligation of the appellant Maria de las Nieves Cabrera y Pruna was that known to the Spanish law as "fianza," and is treated in title XIV, book 4, of the Spanish Code of 1889, beginning with section 1822. The War Department edition of this Code translates the term "fianza" as "security," which covers both the relationship of surety and guarantor.

The only distinction in the Spanish law in the liability of one giving security ("fiador," translated generally as "surety") is that between the joint liability (solidaria) and the several liability (mancomunada).

> "By security (fianza) a person binds himself to "pay or perform for a third person in case the latter "should fail to do so. If the surety binds himself "jointly (solidariamente) with the principal debtor "the provisions of section fourth of chapter 3, title 1, "of this book shall be observed."
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> Article 1822, Civil Code, 1889.

The reference to section fourth, chapter 3, title 1, is to articles 1137-1148, inclusive, relating to both joint and several obligations. Article 1137 provides:

> "The concurrence of two or more creditors, or of "two or more debtors, in a single obligation does not "imply that each one of the former has a right to "ask nor that each one of the latter is bound to com- "ply in full with the things which are the objects of "the same. This shall only take place when the "obligation determines it expressly, being constituted "as a joint obligation."

It will be observed that the note in question, signed by appellant Maria de las Nieves Cabrera y Pruna, fails to contain the express provision that the obligation shall be joint.

It must, therefore, be considered simply as an obligation of security for which said appellant is only secondarily liable.

The obligation of a fianza is accessory to a principal obligation.

Articles 1847-53, inclusive, of the Code of 1889 relate to the "extinguishment of securities":

> "If the creditor voluntarily accepts real estate, or
> "any other goods, in payment of the debt, even
> "should he afterwards lose them on account of evic-
> "tion, the surety shall be released."
> Article 1849.

> "The extension granted to the debtor by the cred-
> "itor without the consent of the surety extinguishes
> "the security."
> Article 1851.

> "The sureties, even when they are joint, shall be
> "released from their obligation whenever by any act
> "of the creditor they cannot be subrogated to the
> "rights and mortgages and privileges of the same."
> Article 1852.

It is a general rule that contracts of this nature are construed strictly in favor of the surety.

(*b*) The deed of sale of March 13, 1901, was a novation.

It cannot be successfully contended that the acceptance by the appellant bank of the stock of goods transferred to it by its debtor was simply an additional security. On the contrary, it was in fact and law a substitution of the debt. It was what the Spanish law terms a "novacion de objeto."

> "The objective novation can be realized by a
> "change of consideration and of the object of the
> "obligation. Novation takes place by the change of
> "consideration if it alters the method of owing or the
> "nature of the obligation; the very example of law,
> "in the case of what the purchaser of a thing owes
> "for its price is substituted or converted into a debt

"by way of a loan. The novation of the object takes "place when the subject or contents of the presta- "tion in which the obligation consists changes: for "example, if for a sum which is due it is substituted "by the prestation of a service, or *vice-versa,* or the "amount due is modified, or there is produced some "important change in the place or form of compli- "ance of the obligation. Whenever there results "any of the preceding cases, or any other analogous "thereto, there will be understood as affected the ob- "jective novation, whether the *voluntas novandi* ex- "pressly appears or whether the novation is deduced "as a necessary result from the incompatibility be- "tween the primitive and subsequent obligation."

Vol. 4, p. 428, Derecho Civil, by Sanchez Roman.

"Besides those which are deduced from the pre- "ceding doctrine, novation has the following effects:

"(1) To extinguish the obligation which has been "substituted and all its accessories and of the guar- "antee unless the contrary shall have been expressly "stipulated, in which case these guarantees will be "considered as re-established, as pertaining to the "new obligation and in virtue of a new contractual "motive, since notwithstanding that in addition to "the rule of law that the accessories follow the condi- "tion of the principal, the obligation newly con- "tracted, which is the consideration of the novation, "remains as the principal one and can not have as "accessories the obligations of the security, mortgage, "and guarantee in general previously created."

Same author, p. 431.

The subject of novation is treated in the Spanish Civil Code of 1889 in Articles 1203-1213, inclusive.

"Obligations may be modified,

"(1) By the change of their object or principal conditions.

"(2) By substituting the person of the debtor.

"(3) By subrogating a third person in the rights of the creditor."

Article 1203.

## Point No. 3.

APPELLEE SHOULD BE ESTOPPED FROM THE RELIEF IT PRAYS FOR AS AGAINST APPELLANTS, FOR THE REASON THAT BY ITS OWN NEGLIGENCE AND MISCONDUCT IT HAS FAILED TO REALIZE ITS DEBT FROM THE STOCK OF GOODS TRANSFERRED TO IT.

We confidently believe that the facts in this case justify the statement of the foregoing point, and that without the citation of authorities this court will admit the equity of the proposition.

## Point No. 4.

APPELLEE ACQUIRED NO SPECIFIC RIGHT OR INTEREST IN THE INHERITANCE OR PARTICIPATIONS OF APPELLANT MARIA DE LAS NIEVES CABRERA Y PRUNA IN THE ESTATE OF HER DECEASED MOTHER, FOR THE REASONS:

(*a*) Such participations were at the time of the execution of the document of February 21, 1900, unassigned.

(*b*) The said document did not, and could not, contain any specific description of the properties, and therefore by the laws of Porto Rico at the time, and by the failure of the registrar to make any inscription, no such right or lien was created, and appellant Magdalena acquired a valid title to the specific participations subsequently acquired by and set apart to appellant Maria de las Nieves Cabrera y Pruna.

The deed of mortgage and cession executed by appellant Maria de las Nieves Cabrera y Pruna on the 21st day of February, 1900, shows that her interest in the estate of her mother had not yet been determined or assigned.

The Civil Code in force in Porto Rico at the time of the execution of the mortgage and supposed cession by appellant,

Maria de las Nieves Cabrera, to the American Colonial Bank, provided, among other things:

> "The following are essential requisites of contracts of pledge and of mortgage:
> "(1) That they be constituted to secure the fulfillment of a principal obligation.
> "(2) That the thing pledged or mortgaged is owned by the person who pledges or mortgages it."
> Article 1857.

> "The following property only can be the subject of a mortgage contract:
> "(1) Real property.
> "(2) Property rights in real estate which can be alienated in accordance with law."
> Article 1874.

The mortgage law of Porto Rico applicable or in force at the time contained the following provisions:

> "Article 108. The following are not mortgageable:
> * * * * * * *
> * * * * * * *
> * * * * * * *
> * * * * * * *
> "(5) The property right in things which, although they will be owned in the future, are not yet recorded in the name of the person who will have a right to own them."

Articles 110 and 111 of the Mortgage Law set forth to what things a mortgage shall be held to extend. They do not include future hereditary rights of the kind described in the document under consideration.

Galindo, the commentator of the mortgage law, in commenting upon article 108, above set forth, says:

> "The prohibition of (5) of article 108 refers in "special manner to hereditary rights. * * *
> "Reasons of another kind advise that there cannot "be mortgaged the real property right in things

"which, although are to be possessed, are not yet "inscribed in favor of the one who may have the "right to possess them. * * *

"But, further, it was necessary that the mortgage "law should put itself in accord with the civil law, "which is opposed, especially with respect to succes- "sions, to the transfer of an expectation of those who "have the presumption of succeeding a determined "person. We believe that the motives just set forth "are superfluous when a mortgage of real rights is "treated of; it is sufficient to prevent a mortgage of "the same that such real property rights are not "inscribed in the name of the person who mortgages "them and does not appear as their owner in the "registry of property; and not appearing in the "registry as such he cannot mortgage them."

Galindo, "Legislacion Hipotecario," vol. 3, p. 199.

Again, in the Civil Code, published subsequent to the mortgage law, it is provided in article 1857, in a decisive manner:

"That it is an essential requisite of contract of "mortgage that the property mortgaged shall belong "absolutely to him who mortgages it, and therefore "there should not in strict right be admitted to in- "scription a deed of mortgage executed by one who "is not the owner of the thing mortgaged."

Same work and volume, p. 279.

As we more confidently rely upon the other points in this case, we do not enter into a discussion of the law bearing on this point. We believe that under the facts before the court it must be held that the alleged cession of hereditary rights in the document of February 21, 1900, is not effective as against appellant Magdalena. Whilst it is true that the mortgage contained in the document was inscribed in the Registry of Property, the record clearly shows that the attempted cession was not inscribed, because at the time of the execution of the said document the participation or interest

of appellant Maria de las Nieves Cabrera y Pruna was not known.

Upon these participations being determined and set apart, appellant Maria de las Nieves Cabrera y Pruna had the power to transfer the same and appellant Magdalena acquired a good title thereto.

No evidence was offered beyond the fact of appellants being sisters to overcome the evidence of consideration and good faith offered by appellants in the trial below.

## Point No. 5.

If the court should hold that the deed of sale of March 12, 1901, was not a payment of discharge, and that appellant Maria de las Nieves Cabrera y Pruna was not a guarantor, but was a principal debtor, jointly liable with Successores de J. M. Suarez y Compañia, then by the note and notarial document executed February 21, 1900, her liability is only several (mancomunada) and not joint (solidaria), and therefore she is not responsible for all of the debt.

In that part of the Civil Code which treats of several and joint obligations, the following articles are found in support of the above proposition:

> "Article 1137. The concurrence of two or more "creditors, or of two or more debtors, in a single obli- "gation does not imply that each one of the former "has a right to ask, nor that each one of the latter is "bound to comply in full with the things which are "the object of the same. This shall only take place "when the obligation determines it expressly, being "constituted as a joint obligation.
>
> "Article 1138. If from the context of the obliga- "tions referred to in the preceding article any other

" thing does not appear the credit or the debt shall
" be presumed as divided in as many equal parts as
" there are creditors or debtors, being considered as
" credits or debts each one different from the other."

WE RESPECTFULLY SUBMIT THAT THE DECREE OF THE COURT BELOW SHOULD BE REVERSED.

FRANCIS H. DEXTER,
*Solicitor for Appellants.*